No. 78-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

BERNARD CAREY, State's Attorney of Cook County, Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and JOYCE C. LASHOF, M.D., Director of Public Health of the State of Illinois, and EUGENE F. DIAMOND, M.D., Intervenor,

Appellants,

vs.

RALPH M. WYNN, M.D., JERZY JOZEF (GEORGE) BIEZENSKI, M.D., MARVIN ROSNER, M.D., JOHN S. LONG, ALLEN G. CHARLES, M.D., YOLANDA ADLER, M.D., MARY ZOE, and ILLINOIS ABORTION SERVICE COUNCIL,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

MOTION TO DISMISS

MERLE L. ROYCE, II
One First National Plaza
Chicago, Illinois 60603
(312) 329-5624

R. PETER CAREY
10 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7080

ATTORNEYS FOR APPELLEES, WYNN, BIEZENSKI, ROSNER, CHARLES, ADLER AND ZOE

Of Counsel:

LOIS J. LIPTON
Roger Baldwin Foundation of ACLU, Inc.
5 South Wabash, Suite 1516
Chicago, Illinois 60603

JEFFREY W. FINKE
One First National Plaza
Chicago, Illinois 60603
(312) 329-5214

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

In The

Supreme Court of the United States

October Term, 1978

BERNARD CAREY, State's Attorney of Cook County, Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and JOYCE C. LASHOF, M.D., Director of Public Health of the State of Illinois, and EUGENE F. DIAMOND, M.D., Intervenor,

Appellants,

vs.

RALPH M. WYNN, M.D., JERZY JOZEF (GEORGE) BIEZENSKI, M.D., MARVIN ROSNER, M.D., JOHN S. LONG, ALLEN G. CHARLES, M.D., YOLANDA ADLER, M.D., MARY ZOE, and ILLINOIS ABORTION SERVICE COUNCIL,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

---

MOTION TO DISMISS

Appellees, Ralph M. Wynn, M.D., Jerzy Jozef Biezenski, M.D., Marvin Rosner, M.D., Allan G. Charles, M.D., Yolanda Adler, M.D., and Mary Zoe, pursuant to Rule 16(1)(a) of the Revised Rules of this Court, move to dismiss on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the constitutional validity of certain provisions of the Illinois Abortion Act of 1975 (hereinafter referred to as the "Act"), Ill. Rev. Stat., Ch. 38 §§ 81-21 *et seq.* (1976).[1]

The Act promulgated a comprehensive penal scheme whereby abortions were regulated at all stages of pregnancy by numerous procedural and substantive restrictions. Section 2(6) of the Act established the offense of "criminal abortion." This offense was punishable under Section 11(a) of the Act as a Class 2 felony by incarceration between one and twenty years.[2] Section 3 required an elaborate written certification of the woman's consent to the abortion, which, under Section 3(2)(a) required the physician to "inform" his patient of the "competency of the fetus . . . such as, but not limited to, what the fetus looks like, fetus ability to move, swallow and its physical characteristics." The physician was also required under Section 3(2)(b) to inform his patient of the "general dangers of abortion, including, but not limited to, the possibility of subsequent sterility, premature birth, live-born fetus and other

[1] The Act is set forth in the Appendix to Appellant's Jurisdictional Statement at AA 1-7.

[2] The Illinois Abortion Act of 1975 was passed as a new provision to the Illinois Criminal Code. The Criminal Code provides a sentence of one to twenty years upon conviction of a Class 2 felony. Ill. Rev. Stat., Ch. 38 § 1005-8-1(b)(3) (1977). Eight provisions of the Act carried the sanction of a conviction as a Class 2 felony, while three provided the penalty of a Class B misdemeanor, punishable by incarceration up to six months. Ill. Rev. Stat., Ch. 38 § 1005-8-3(a)(2) (1977).

dangers." Sections 3(3) and (4) also prohibited a physician from performing an abortion for a married woman without her spouse's written consent or for an unmarried minor without the written consent of one of her parents.

Section 5(2) of the Act prohibited the performance of a therapeutic abortion after the viability of the fetus, unless the woman's physician consulted with two "unrelated" physicians. Section 7 provided for the automatic termination of a woman's and her consenting spouse's parental rights where a live birth occurs after an "attempted," non-therapeutic abortion. A companion provision, Section 8, required a physician to "inform" only a post-viability abortion patient of this automatic termination of parental rights. Further, Section 9 of the Act prohibited the second trimester abortion technique of saline amniocentesis. Finally, Section 10 established elaborate reporting requirements including the recording of each abortion performed after 20 weeks of gestation as a fetal death under the Vital Records Act.

B. The Proceedings In The District Court

Appellant Bernard Carey, in his capacity as State's Attorney of Cook County and as the representative of the defendant class of Illinois State's Attorneys appeals from a declaratory judgment of a three-judge district court, declaring unconstitutional the provisions enumerated above. The proceedings in the district court were brought under 42 U.S.C. § 1983 as a class action by four obstetricians and gynecologists who render abortions as part of their practices, and two pregnant women. Appellees sought a declaratory judgment holding the Act unconstitutional, pursuant to 28 U.S.C. §§ 2201 and 2202, and an injunction restraining the enforcement of

the Act, pursuant to 28 U.S.C. § 2281 and 2284. The jurisdiction of the court was invoked pursuant to 28 U.S.C. § 1343.

Appellees' complaint named the Illinois state officials charged with implementing and enforcing the Act. These officials were the Illinois Attorney General, the Director of the Illinois Department of Public Health and Appellant Carey, who was sued in his official capacity as the State's Attorney of Cook County, and as the representative of the class of all Illinois State's Attorneys.

After the issuance of a temporary restraining order, a three judge district court issued a preliminary injunction. Plaintiff classes of pregnant women and physicians affected by the Act were subsequently certified by the district court. In addition, the class of defendant State's Attorneys in Illinois was certified.

Appellees then moved for summary judgment. During the pendency of this motion this Court rendered its decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). In view of *Danforth*, Appellant Carey conceded the unconstitutionality of the parental consent [Section 3(4)] and spousal consent [Section 3(3)] provisions of the Act. (See Appellant Diamond's Jurisdictional Statement App. at 25a)[3]

Granting Appellees' motion for summary judgment, the three-judge district court issued a declaratory judgment finding nine other provisions of the Act unconstitutional. It found the definition of criminal abortion and accompanying criminal penalties void for

[3] The district court's opinion is attached to Appellant's Jurisdictional Statement and is hereinafter cited as "App. at ..... ."

vagueness, failing to adequately define the criminal conduct which was punishable as a Class 2 felony. (App. at 48a-52a) It found the provisions requiring physicians to inform their patients of the competency of the fetus [Section 3(2)(a)] and the general dangers of abortion [Section 3(2)(b)] unconstitutionally vague and to impose an impermissible burden on the decision of a woman, in consultation with her physician, to have an abortion. (App. at 23a-25a) It found the automatic termination of parental rights under Section 7 to violate fundamental due process. (App. at 36a-40a) It found the warning of the termination of parental rights required by Section 8 to be irrational since the warning was to be given only after viability to women who were not subject to Section 7. (App. at 39a-40a) Finally, it found recording of fetal deaths under the Vital Records Act as required by Section 10 to be unconstitutional because the procedure did not protect the confidentiality of women. (App. at 44a-48a)

The three-judge court denied Appellees' request for injunctive relief, assuming that Illinois' prosecutorial authorities would recognize and abide by its judgment, and granted only Appellees' prayer for declaratory relief. (App. at 55a)

Appellant Carey then filed appeals to the United States Court of Appeals for the Seventh Circuit, as well as this Court. Appellees have filed no cross appeals.

II.

ARGUMENT

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT.

Appellant Carey attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1253, citing the cases of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). However, 28 U.S.C. § 1253 does not authorize a direct appeal from a grant or denial of declaratory relief alone. This Court's decisions in *Roe* and *Planned Parenthood* are inapplicable, since both cases involved appeals from the grant or denial of an injunction against a statute of state-wide applicability.

Rather, the controlling authority is this Court's *per curiam* decision in *Gerstein v. Coe*, 417 U.S. 279 (1974):

> A three-judge District Court entered a declaratory judgment holding unconstitutional a Florida statute, . . . which forbids an abortion without . . . [spousal or parental] consent . . . . Because it was anticipated that the State would respect the declaratory judgment, the court declined to issue an injunction against the enforcement of the statute. The State of Florida appeals from the declaratory judgment invalidating the statute. The appeal is dismissed for want of jurisdiction. Title 28 U.S.C. § 1253, under which this appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone. *Gunn v. University Committee*, 399 U.S. 383 (1970); *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc., Division of St. Mary's Hospital*, 397 U.S. 820 (1970); see also *Roe v. Wade*, 410 U.S. 113, 123 (1973). The declaratory judgment is appealable to the Court of Appeals, and we are informed that an appeal to that court has already been taken.

Appellant Carey has presented no circumstances which warrant a departure from the holding in *Gerstein*.

CONCLUSION

For the foregoing reasons, Appellees respectfully submit that the Court should dismiss this appeal.

Respectfully submitted,

MERLE L. ROYCE, II
One First National Plaza
Chicago, Illinois 60603
(312) 329-5624

R. PETER CAREY
10 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7080

ATTORNEYS FOR APPELLEES, WYNN, BIEZENSKI, ROSNER, CHARLES, ADLER AND ZOE

Of Counsel:

LOIS J. LIPTON
Roger Baldwin Foundation of ACLU, Inc.
5 South Wabash, Suite 1516
Chicago, Illinois 60603

JEFFREY W. FINKE
One First National Plaza
Chicago, Illinois 60603
(312) 329-5214


see
7 8
2 3 9